

REVISED LEGAL REVIEW NOTE

HB 112 (LC0198)

Short Title: Improve actuarial funding for teachers' retirement system

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Date: January 24, 2013, revising legal review note of December 10, 2012

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

HB 112, previously identified as LC0198, as drafted, may raise potential constitutional issues associated with Article II, section 31, of the Montana Constitution and Article I, section 10, of the United States Constitution. Article II, section 31, of the Montana Constitution provides: "No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature. Article I, section 10, of the U.S. Constitution provides in pertinent part that no state shall, without the consent of Congress, pass any law impairing the obligation of contracts.

Montana generally treats the right to a public pension as a contract right. *Clarke v. Ireland*, 122 Mont. 191, 199 P.2d 965 (1948), *Evans v. Fire Dept. Relief Ass'n*, 138 Mont. 172, 355 P.2d 670 (1960), *Bartels v. Miles City*, 145 Mont. 116, 399 P.2d 768 (1965), and *Sullivan v. State*, 174 Mont. 482, 571 P.2d 793 (1977). While the Montana Supreme Court has not expressly adopted a theory of law allowing interference with statutory public retirement pensions, the Montana Supreme Court has held that the Montana and federal contract clauses are interchangeable and that federal case law allowing interference with contracts is therefore of precedential value in Montana. See, e.g., *City of Butte v. Roberts*, 94 Mont. 482, 23 P.2d 243 (1933), and *Neel v. First*

Fed. S and L Ass'n, 207 Mont. 376, 675 P.2d 96 (1984).

HB 112, as drafted, requires a current member of the teachers' retirement system hired before July 1, 2013, to contribute to the retirement system a supplemental amount equal to 1% of the member's earned compensation. Section 6(1). Consequently, a potential issue is whether raising the contribution level of an existing member substantially impairs the member's contractual right to retirement benefits and therefore may conflict with Article II, section 31, of the Montana Constitution and Article I, section 10, of the U.S. Constitution.

The United States Supreme Court in *U.S. Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977), has held that a contract impairment will be held unconstitutional if: (1) the impairment is a substantial impairment; and (2) the government enacting impairing legislation does not first at least seriously consider nonimpairing or lesser impairing legislation. While this test has not specifically been adopted for application to public retirement pensions in Montana, the WHEREAS clauses in HB 112 document the Legislature's process for considering nonimpairing or lesser impairing legislation and attempt to show that HB 112 constitutes a reasonable and necessary alternative to fund the retirement system in an actuarially sound manner as required by Article VIII, section 15, of the Montana Constitution.

Public School Fund Revenue Issues:

HB 112, as drafted, may raise potential constitutional issues associated with Article X, section 5, of the Montana Constitution that provides:

Section 5. Public school fund revenue. *(1) Ninety-five percent of all the interest received on the public school fund and ninety-five percent of all rent received from the leasing of school lands and all other income from the public school fund shall be equitably apportioned annually to public elementary and secondary school districts as provided by law.*

(2) The remaining five percent of all interest received on the public school fund, and the remaining five percent of all rent received from the leasing of school lands and all other income from the public school fund shall annually be added to the public school fund and become and forever remain an inseparable and inviolable part thereof. (emphasis added).

Pursuant to Article X, section 5, of the Montana Constitution, the Legislature:

- (1) defined what constituted interest and income money under section 20-9-341, MCA;
- (2) required, pursuant to section 20-9-342, MCA, that the state board of land commissioners deposit the interest and income money each fiscal year to the guarantee account established in section 20-9-622, MCA; and
- (3) directed that the money flowing from the guarantee account be statutorily appropriated and be used for state equalization aid to school districts. (sections 20-9-342, 20-9-343, and 20-9-622, MCA).

Article X, section 5, of the Montana Constitution requires that public school fund revenue "be equitably apportioned annually to public elementary and secondary school districts as provided by law." Section 20-9-343, MCA, defines what "equitably apportioned" means:

20-9-343. Definition of and revenue for state equalization aid. (1) As used in this title, the term "state equalization aid" means revenue as required in this section for:

(a) distribution to the public schools for guaranteed tax base aid, BASE aid, and state reimbursement for school facilities; and

(b) negotiated payments authorized under 20-7-420(3) up to \$500,000 a biennium.

(2) The superintendent of public instruction may spend throughout the biennium funds appropriated for the purposes of guaranteed tax base aid, BASE aid for the BASE funding program, state reimbursement for school facilities, and negotiated payments authorized under 20-7-420(3).

(3) The following money must be paid into the guarantee account provided for in 20-9-622 for the public schools of the state as indicated:

(a) subject to 20-9-516(2)(a), interest and income money described in 20-9-341 and 20-9-342; and

(b) investment income earned by investing interest and income money described in 20-9-341 and 20-9-342.

Section 18 of HB 112 statutorily appropriates from the guarantee account \$25 million each fiscal year to the Teachers' Retirement System. Members of the Teachers' Retirement System not only include public school district members, but include members associated with the School for the Deaf and Blind, Office of Public Instruction, Board of Public Education, Community Colleges, and the Montana University System, all of which benefit from the Teachers' Retirement System being actuarially sound.

Because HB 112 statutorily appropriates money from the guarantee account for purposes other than for being equitably apportioned annually to public elementary and secondary school districts, it may raise potential constitutional conformity issues with Article X, section 5, of the Montana Constitution.

Requester Comments: None